

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO. 682 OF 2003

IN

SUIT NO. 667 OF 2003

Shri H.M. Saraiya

& Ors. .. Plaintiffs.

vs.

Ajanta India Ltd, .

& Anr. .. Defendants.

Dr. V.V. Tulzapurkar, Sr. Adv. with Shyam

Diwan, Sr. Adv. Rahul Kadam and

Nikhil Bodade i/by H.W. Kane

for plaintiffs to support the n/m.

Shri Aspi Chinai, Sr. Adv. with Janak Dwarkadas,

Sr. Adv. with V.R. Dhond, S. Jagtiani

& Manish Saurastri, Utkarsh Tewari,

i/by Shantilal & Co. for Defendants

to show cause.

CORAM : S.U.KAMDAR, J.

DATE : 7th March, 2006.

ORAL JUDGMENT :

. The present notice of motion is taken out by the plaintiffs seeking reliefs that the defendants should be restrained from using the trade mark 'Ajanta' in respect of the non-medicated toilet preparations including tooth paste, soaps, shaving cream, shampoo and allied goods. The said injunction is sought by them on grounds of both infringement of "trade mark" and "passing off". However, the learned counsel appearing for the plaintiffs has fairly stated that he is pressing relief only on the basis of a "passing off" action in view of the fact that the defendants mark ''Ajanta'' is already registered for the tooth paste. He has further submitted that though the reliefs in the motion are sought in respect of various non-medicated toilet preparations including soaps, shaving cream, shampoo, cosmetics and allied goods, for the purpose of the present notice of motion he is restricting his claim to passing off only in respect of tooth paste.

2. Some of the material facts of the present case, briefly enumerated, are as under :-

3. In the year 1950 a company known as Bombay Brush Co. which was a partnership firm adopted a trade mark ''Ajanta'' in respect of tooth brushes.

In 1958, a company known as Bombay Brush Co. Pvt. Ltd., was incorporated by the erstwhile partners of the partnership firm Bombay Brush Company who took over the business of the said partnership firm. It is the case of the plaintiff that during the period 1958 to 1987 the Bombay Brush Co. Pvt. Ltd., and its licensee Bombay Brush Baroda Pvt. Ltd., and Bombay Brush Belgaum Pvt. Ltd., used extensively the trade mark in respect of tooth brushes and shaving brushes. On 3.9.1959 the trade mark 'Ajanta' was registered under Registration No. 191915 in respect of brushes falling in Class 21 in favour of the said Bombay Brush Co. Pvt. Ltd. On 19.2.1964 one Mahipal V. Saraiya obtained registration of the word mark 'Ajanta' in respect of non-medicated toiletry preparations, cosmetics and perfumes falling in Class 03 of the schedule to the Trade and Mercandise Marks Act, 1958.

4. In the year 1971 a company known as Ajanta Transistor Clock Co., being the 2nd defendant herein conceived a trade mark Ajanta in respect of clocks, wrist watches, time pieces under Class 14 of the Schedule to the Trade and Mercandise Marks Act, 1958.

5. On 28.12.1978 the Bombay Brush Co. Pvt. Ltd., assigned the said trade mark 'Ajanta' registered under Class 21 to R.S. Champalal

Vijaychand Saraiya, HUF. The said HUF was represented by Mahipal V. Saraiya. On 14.10.1987 the mark ''Ajanta'' which was also registered under Class 3 under registration No. 220724-B was also assigned to R.S. Champalal Vijaychand Saraiya by the said Bombay Brush Co. Pvt. Ltd., On 14.10.1987, a registered user agreement was entered into between the said HUF of R.S. Champalal Vijaychand Saraiya and Bombay Brush (Indore) Pvt. Ltd., Bombay Brush (Vidarbha) Pvt. Ltd., Bombay Brush (Belgaum) Pvt. Ltd., and Bombay Brush (Baroda) Pvt. Ltd.. On 29.10.1987, two applications were made to bring on record the said HUF as subsequent proprietors of registered trade mark in Class 21 and 3. On 25.1.1988 and 10.8.1988 Registrar allowed both the said applications and thus the said R.S. Champalal Vijay Saraiya, HUF has come on record as a proprietor of the registered trade mark in respect of the mark 'Ajanta' both falling in Class 3 and Class 21.

6. in or about 1989 Ajanta Watch Pvt. Ltd., was incorporated. However, the said name of Ajanta Watch Pvt. Ltd., was subsequently changed in 1994 to Ajanta Watch Ltd., and in April 2002 to Ajanta India Ltd, .

7. On 2.1.1989 the defendants also applied for registration of Ajanta trade mark in Class 14 for

the purpose of clocks and time pieces. On 25.7.1990, the defendants made an application for registration of their trade mark Ajanta in classes 4, 13, 15, 17, 20, 22, 27 and 33. On 27.8.1990, the 2nd defendant made an application for registration of the mark Ajanta in respect of cosmetics, dentrifices, tooth paste, depilatory, shaving preparations, talcum powder, make up, hair dye, perfumes under Class 3. The said application inter alia indicated that mark 'Ajanta' is not in use but is proposed to be used. Thus, the mark Ajanta was not used by the defendants upto 27.8.1990 in relation to the items which are falling under class 3 which includes dentrifices and tooth paste. In 1990-91 the defendants also applied for registration of trade mark 'Ajanta' in classes 7, 8, 10, 16, 19, 21 and 25.

8. It is the further case of the plaintiffs that during the period 1987 to 1995 the two registered trade marks bearing Nos. 191915 and 344242 both in class 21 were extensively used in relation to tooth brushes. In so far as the sale and advertisement expenses are concerned the details thereof are set out in the plaint. There is no dispute that the plaintiffs were in the market since 1958 with trade mark 'Ajanta' in relation to the tooth brushes and was selling the same extensively. There is also no dispute that the plaintiffs have

acquired a reputation in the mark 'Ajanta' so far as the tooth brushes are concerned. The figures of sales and advertisements which are given at Exhibits C-1 to C-4 and C-5 to C-8 to the plaint in relation to tooth brushes are also not much disputed.

9. Sometime in or about the year 1994, Registrar raised a preliminary objection to the application of the defendants for registration of mark 'Ajanta' in class 3 for tooth paste stating inter alia that there is already an existent mark "Ajanta" belonging to the plaintiffs under No. 220724-B in Class 3 of the said schedule to the said Act.

10. On 1.11.1994 the Karta of the said HUF namely, R.S. Champalal Vijaychand Saraiya expired. On 9.10.1995, the plaintiffs permitted Bombay Brush Vidarbha Pvt. Ltd.,, Bombay Brush Indore Pvt. Ltd., and Vidarbha Hygiene Products Pvt. Ltd., and Indore Hygiene Products Pvt. Ltd., to use its registered trade mark "Ajanta" during the period 1995 to 2002. The said four registered users who were the licensees under agreement extensively used the said trade mark "Ajanta" in respect of tooth brushes and even in respect of sales and advertisements expenses pertaining to tooth brushes by the said users there is no much dispute between the parties. On 18.12.1995 an application was made

by the plaintiffs to the Registrar of Trade Marks to bring on record the name of the plaintiffs as the subsequent proprietor of the mark "'Ajanta'" since the previous Karta of the HUF has expired.

11. On 1.1.1996 the trade mark "Ajanta" of the defendant no. 2 pertaining to the application in class 3 was advertised in the Trade Mark Journal. In view of the fact that there was no objection of the plaintiffs to the said trade mark, the said trade mark "Ajanta" has been duly registered under Class 3.

12. On 27.7.1996, an application was made for registration of the mark by the various licensees of the plaintiffs as the registered users of the mark. On 28.1.1997 Bombay Brush (Indore) Pvt. Ltd., was registered as a user of the plaintiffs' mark.

13. On 15.5.1997, the 2nd defendant made an application under the mark "'Ajanta'" which was registered on 27.8.1990 in Class 3 of the Schedule to the said Act.

14. In May, 1998, the Registrar of Trade Marks allowed the request to bring on record the plaintiffs' name as the subsequent proprietors of the trade mark "'Ajanta'" on the death of the previous Karta. On 19.3.1999 the plaintiffs' trade

mark in the mark "Ajanta" in Class 3 was renewed. On 7.4.2000 the plaintiffs' trade mark "Ajanta" in Class 21 was also renewed.

15. On 5.5.2000, the defendant no. 1 decided to manufacture consumer goods products such as tooth paste, shampoo, soaps and like items. A Board Meeting was called on 5.5.2000 and the Board Resolution was passed to that effect. In January, 2002 defendants started construction of the manufacturing unit for their Fast Moving Consumer Goods, hereinafter referred to as "FMCG products" to be produced under the trade mark 'Ajanta' at Morbi, Gujarat. On 15.2.2002, the objects clause of the defendant company was altered to include buying, selling and manufacturing the FMCG products. On 22.3.2002, an Extra Ordinary General Body meeting of the 1st defendant was held to amend their name to Ajanta India Ltd. and one of the explanatory statement thereto explained that the company plans to venture into the field of toiletries, cosmetics and its allied products and that it had placed an order for purchase of machineries for toiletries. On 9.4.2002 the name of the defendant no. 1 was changed from Ajanta Watch Ltd., to Ajanta India Ltd. It is the case of the defendants that the name was changed keeping in mind the diversification undertaken by the defendants to manufacture and sell various FMCG products.

16. In or about April 2002, the plaintiffs requested Alps Containers Pvt. Ltd., to manufacture tooth paste, shaving cream and shampoo on their behalf. On 4.4.2002, the plaintiffs requested Alps Containers Pvt. Ltd., to obtain a Food and Drug Licence to manufacture tooth paste. On 11.4.2002 the plaintiffs made an application for rectification of the 2nd defendant's trade mark "Ajanta" under application for rectification No. AMD-60931. The said application was made inter alia on the ground that there was no bonafide intention of the defendants to use the mark nor was there any actual user and that the registration of the said trade mark was prohibited under section 12 (1) of the Trade and Mercandise Marks Act, 1958. On 25.4.2002 it is the case of the plaintiffs that they made advance payment to Alps Containers Pvt. Ltd., by cheque for the purpose of manufacturing tooth paste. On 29.4.2002 the plaintiffs claim to have placed a confirmed order on Alps Containers Pvt. Ltd., for manufacturing the tooth paste under brand 'Ajanta' for the purpose of sale and distribution thereof in the market by the plaintiffs. On 2.5.2002 an agreement was entered into under which Alps Containers Pvt. Ltd., has been permitted to use the mark 'Ajanta' for the goods which are manufactured by them for the plaintiffs. On 1.6.2002, according to the plaintiffs, Alps Containers Pvt. Ltd,

produced the goods and delivered the same to the plaintiffs for the purpose of sale in the market and paid excise duty in respect of the said goods. On 3.6.2002, on account payment was made by the plaintiffs to Alps Containers Pvt. Ltd., for manufacturing the said tooth paste for and on behalf of the plaintiffs. On 16.7.2002 they made final payment to Alps Containers Pvt. Ltd., for manufacturing the tooth paste on their behalf. On 5.8.2002, a letter was addressed by the Registrar to the Defendants attorney regarding rectification application filed by the plaintiffs and a copy thereof was sent to the 2nd defendant. Thus, according to the plaintiffs the defendants were aware as far back as on 5.8.2002 that the plaintiffs are objecting to their mark being used in respect of tooth paste and an application for rectification has been filed.

17. On 19.9.2002, an assignment of the mark 'Ajanta' was executed by the 2nd defendant in favour of the 1st defendant. The said mark was assigned to the 1st defendant in respect of all items except the items of clock and time pieces. According to the plaintiffs they have been using the said mark 'Ajanta' in respect of tooth paste since June 2002. The defendants commenced the sale of tooth paste under the trade mark 'Ajanta' with effect from 20.12.2002 and by the time the suit was

filed in February 2003, according to the defendants, the sales figures of the defendants were almost 3,00,000 tubes per day and had effected sales in excess of Rs. 100 lacs.

18. On 6.1.2003, an application was filed by the defendants for rectification of the plaintiffs' mark in respect of class 3. On 8.1.2003 the defendant no. 1 issued a caution notice regarding trade mark 'Ajanta' in Mid Day, Mumbai. However according to the plaintiffs between 6.6.2002 to 11.1.2003 they have already sold the said tooth paste under their name 'Ajanta' and have furnished sales figures and invoices indicating the said sale. It is thus the case of the plaintiffs that the plaintiffs are prior users of the mark 'Ajanta' in relation to tooth paste. The plaintiffs further contend that being the prior user of the said mark, they are entitled to an injunction of passing off as against the defendants who have admittedly started using the said mark only from 20.12.2002 and not before. On 18.1.2003, the defendants filed a suit being Suit No. 163 of 2003 for infringement and passing off against the plaintiffs' predecessors and others in Ahmedabad City Civil Court in the State of Gujarat. Ad interim application was made. The said ad-interim application was refused. On 21.1.2003 the plaintiffs entered their appearance in Ahmedabad suit and have opposed the application for interim

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injunction. The said application for interim reliefs is still pending.

19. On 1.4.2003 a meeting took place between one Mr. H.M. Sariya of the plaintiffs and one Mr. Ashok Patel of the defendants and according to the defendants in the said meeting Mr. H.M. Sariya demanded a payment of Rs. 3 crores failing which he has threatened that he will file a suit against the defendant no. 1 restraining them from using the brand 'Ajanta'.

20. On 25.1.2003 the Assistant Registrar of Trade Marks confirmed to M/s Ajanta India Ltd,. that tooth paste is covered by the head "dentifrices" and is not covered by the head "non medicated toilet preparations" as appearing in class 3 of the Schedule to the said Act.

21. On 20.2.2003, present suit is filed by the plaintiffs against the defendants for action of infringement and passing off in respect of the said mark ''Ajanta'', in relation to the 'tooth paste' product.

22. On 9.4.2003, an ad interim injunction was granted by this Court in the present suit. However, the said order was stayed in an appeal preferred by the defendants. The appeal was finally dismissed

but stay was continued to enable the defendants to file a special leave petition in the Supreme Court. On 26.7.2003 the special leave petition filed by the defendants has been disposed off with a direction to the learned Single Judge to decide the Notice of Motion finally and the ad-interim order was stayed till the hearing and disposal of the Notice of Motion.

23. The learned counsel Dr. Tulzapurkar appearing for the plaintiffs has contended before me two fold proposition. Firstly it has been contended that admittedly the plaintiffs have entered in the market with tooth paste under the brand 'Ajanta' prior to the defendants coming to the market and thus, they are entitled to injunction on the ground of passing off since they are prior users. According to the learned counsel it is not disputed that the sales of the plaintiffs for the 'Ajanta' brand tooth paste commenced in June 2002 whereas the defendants started their sale only in December 2002 and thus the plaintiffs were in market for almost six months prior to the defendants and, therefore, the defendants are entitled to injunction on the basis of a passing off action. It has been contended that the adoption of the mark 'Ajanta' by the defendants is not bonafide and is with an intention to use the good will earned by the plaintiffs. He has further contended that the defendants have deliberately

adopted the mark even after they were put to the notice by letter dated 5.8.2002 from the trade mark registry which was communicated to the defendants inter alia pointing out therein that the mark "Ajanta" is being used by the plaintiffs in relation to their product of tooth paste and in spite of the said notice still the defendants purportedly proceeded to commence sale in December, 2002 under the Trade mark "'Ajanta'" for tooth paste. It is thus contended that the defendants deliberately with full knowledge that the plaintiffs' mark 'Ajanta' is registered in respect of tooth paste still adopted the said mark in December, 2002 and thus the adoption of the mark is not bonafide and is solely to create a confusion in the minds of the people that their goods of tooth paste under the word 'Ajanta' is manufactured by the plaintiffs. It is thus contended that the defendants' adoption of the mark not being bonafide the plaintiffs are entitled to injunction. It has been further contended by the learned counsel Mr. Tulzapurkar that even on 6.1.2003, the defendants were well aware that the plaintiffs have applied for rectification of the defendants mark on the ground that the plaintiffs are a prior registered holder of the mark 'Ajanta' in relation to tooth paste but inspite of the same the defendants continued to use the mark 'Ajanta' in relation to tooth paste. It is his case that the defendants having entered in the market only in

December 2002 they should have stopped the user of the mark in January, 2003. Thus it is contended by Dr. Tulzapurkar that it cannot be said that the defendants are a bonafide user of the said mark 'Ajanta' in relation to their product tooth paste.

24. In the alternative, the learned counsel has contended that even on the assumption that the plaintiffs are not entitled to an injunction on the ground that the plaintiffs are prior users of the said mark in relation to tooth paste still it can not be disputed that the plaintiffs have acquired a tremendous reputation under the brand name 'Ajanta' in so far as tooth brushes are concerned and that their tooth brushes under the brand name 'Ajanta' are in the market since 1958. It has been contended that so far as sales figures and reputation of the brand 'Ajanta' in respect of tooth brushes manufactured by the plaintiffs is concerned there is no dispute that the plaintiffs have acquired an unchallengeable reputation and thus by virtue thereof plaintiffs are entitled to restrain the defendants from using the said brand 'Ajanta' even in relation to their product tooth paste. It has been contended by the learned counsel for the plaintiffs that though the said goods are not similar still they are cognate and complementary or associated goods and/or in any event the goods both fall in common field of activity and, thus, the

plaintiffs are entitled to injunction as against the defendants from using the said mark Ajanta in so far as their product tooth paste is concerned.

25. In support of the aforesaid contentions, the learned counsel appearing for the plaintiffs has relied upon the judgment of the Delhi High Court in the case of Century Traders v. Roshan Lal Duggar & Co. and others, reported in AIR 1978 Delhi 250, particularly para 12 thereof to contend that the registration of the Trade Mark by the plaintiffs under Class 3 in respect of tooth paste would not give him any new right in the mark or any greater rights than what already existed in common law and a person who is a prior user is entitled to maintain a suit for passing off even against the registered trade mark holder. The learned counsel has thereafter relied upon a judgment of the learned Single Judge of this Court in the case of Consolidated Foods Corporation vs. Brandon and Co. Private Ltd., reported in AIR 1965 Bombay 35 which has been reproduced in the judgment of the Delhi High Court in para 12 thereof. He has drawn my attention to para 27 of the said judgment. Thereafter he has relied upon a judgment of the Gujarat High Court in the case of Duncan Agro Industries Ltd,. vs. Somabhai Tea Processors (P) Ltd., reported in 1994 IPLR 249 and he has relied upon para 15 of the said judgment in which it has

been held that a prior sale is an important factor for the purpose of determining the issue of passing off. He has thereafter also relied upon a recent judgment of the Apex Court in the case of Dhariwal Industries Ltd, & Anr. vs. M.S.S. Food Products, reported in 2005 (30) PTC 233 (SC) and drawn my attention to the following passage :

"8. The principles governing the grant of interim injunction are well settled and do not require to be repeated. The interim injunction has been granted in favour of the plaintiff in this case mainly on the finding that there was prior user of the mark "Malikchand", if not by the plaintiff, by his assignors and the use of the mark "Manikchand" by the defendants in respect of Pan Masala and Gutakha and Supari commenced only at a later point of time. This prima facie finding of prior user was arrived at by the trial court relying on the deeds of assignments produced by the plaintiff and some documents and affidavits produced in support of its claim. Some inconsistencies in the claim of the defendants were also referred to."

On the basis of aforesaid judgements the learned counsel has contended that in so far as the tooth

paste is concerned, the plaintiffs are admittedly a prior user of mark 'Ajanta' and the defendants have admittedly entered in the market subsequently. He further submitted that in the present case a classical trinity has been established. Firstly the goods are identical being tooth paste. Secondly, the mark is identical being 'Ajanta' and thirdly, the class of consumers of the said goods are identical. It has been contended that once it is so then the plaintiffs being the prior user of the said mark 'Ajanta' in relation to tooth paste the injunction in their favour in respect of passing off action must follow.

26. Alternatively, it has been contended by the learned counsel for the plaintiffs that assuming that the plaintiffs are not entitled to the injunction of passing off by virtue of their prior user in tooth paste still according to the plaintiffs they are entitled to injunction of passing off because they have already acquired a tremendous reputation in respect of mark 'Ajanta' in relation to the tooth brush and tooth paste being complimentary and/or cognate product, the plaintiffs are entitled to injunction in that behalf. In support of the aforesaid contention, the learned counsel for the plaintiffs has relied upon a plethora of judgments which I have penned down hereinbelow:-

First he has relied upon the judgment of the Allahabad High Court in the case of Thomas Bear & Sons (India) v. Prayag Narain, reported in AIR 1935 Allahabad 7, particularly following passage:-

"The learned Judges formulated two questions for reference to a third Judge. They are as follows:

"(1) Does the plaintiffs' right in respect of his elephant trade-mark apply only to cigarettes and smoking tobacco or does it extend also to chewing tobacco? (2) Is the defendant's trade mark a colourable imitation of the plaintiffs' trade-mark, so that ordinary or unwary customers are likely to mistake the defendant's goods for the goods of the plaintiff?"

It will be seen that the answer to the first question largely depends upon the answer to the second. I propose to consider the latter first. There is no statutory law in India on the subject of trade-marks. Cases of this description have to be decided according to rules of justice, equity and good conscience. English law on the subject may be applied not because it is applicable as such in India, but because it embodies rules of justice, equity and good conscience. Conditions peculiar to this country may however necessitate acceptance

of the English law with certain modifications. In England there is now the Trade Marks Act of 1905, under which trade-marks are registered for specified classes of goods. Though the provisions of that enactment are based on decisions given before the Act was passed, the decisions under the Act should be applied with caution, as they are not infrequently based on the terms of the statute rather than on the broad principles of justice, equity and good conscience, which influenced the decisions before the Act. For this reason I do not propose to discuss cases arising from disputes as to registration of trade-marks.

It cannot be denied that no one has the monopoly of using a particular mark or symbol to advertise his goods, so that no other person can use it for advertising his goods which have nothing in common with the former's goods. At the same time, no trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead unconscious purchasers, and the use of such trade-mark may be restrained by injunction, although no purchaser has actually been misled: 7 A C 219 (12). I was held in the leading case of

2 Q B 639 (13), that if the use by the defendant upon his goods of unregistered trade-mark belonging to the plaintiff is calculated to pass off, or cause to be passed off, the defendant's goods as the goods of the plaintiffs, an injunction may be granted to restrain such use, and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive or not; See also 41 Ch D 35 (14). At the same time, the exclusive right to use a trade-mark is ordinarily restricted to the class of goods to which it has been attached or applied; see 12 A C 453 (15).

The underlying principle of these cases obviously is that the defendant should be restrained from deliberately or inadvertently creating an impression in the mind of customers that his goods are those manufactured by the plaintiff. Where there is a likelihood of such impression being created, the defendant is restrained not only from manufacturing precisely the same kind of goods as those manufactured by the plaintiff, but also goods having some affinity with the plaintiff's goods."

27. He has thereafter relied upon the judgment

of the Delhi High Court in the case of Ellora Industries, Delhi vs. Banarasi Dass Goela, reported in AIR 1980 Delhi 254, particularly para 20 thereof which reads as under :-

"20. On the question whether there can be passing off if the fields of activity are different, opinions differ. But everybody is agreed that if the line of business is same or allied there is an immense potential for confusion, deception and temporal harm. The test of common field of activity comes handy. Both parties are in the same trade. The plaintiffs sell clocks. The defendants sell time-pieces. And a time-piece is a portable clock, after all."

28. Thereafter the learned counsel for the plaintiffs has relied upon the binding judgments of this Court. He has relied upon the case of Bajaj Electricals Limited, vs. Metals and Allied Products, Bombay and another, reported in AIR 1988 Bombay, 167, particularly para 8 which reads as under :-

"8. Mr. Tulzapurkar submitted that it is not really necessary to consider different judgments of the House of Lords because Lord Denning had also observed that the

defendants would have no defence if the user of the name of the defendants is likely to deceive irrespective of the fact whether the user was honest and that conclusion of Lord Denning is also approved by Lord Devlin who was in minority. Mr. Tulzapurkar submitted that in the present case, there is a specific evidence on record that the word "Bajaj" was used by the defendants dishonestly and deliberately with a view to take a advantage of the reputation earned by the plaintiffs. The learned counsel referred to us to a passage at p. 408 in Kerly's Law of Trade Marks and Trade Names, Twelfth Edition, and submitted that once intent to deceive is established, then the defendants could not claim that they were entitled to use word "Bajaj" as a trading sign. In support of the submission, the learned counsel invited our attention to the brochure (Ex. 'G' annexed to the plaint) wherein the defendants have claimed that Bajaj quality is well accepted and appreciated internationally. Mr. Tulzapurkar points out and it is not in dispute that the defendants have never marketed their goods abroad, nor have they even claimed that their goods are sold all over the country. Mr. Tulzapurkar is right

and we agree with the learned trial Judge that the brochure published in the year 1987 is issued with a view to cause deception or confusion in the mind of the customers. The word 'Bajaj' has quite a great reputation in the country and abroad and the publication of the brochure in the year 1987 clearly indicates that the defendants were not honest in the use of the word "Bajaj" and an attempt was made to pass off their goods with the mark "Bajaj" with the intention to secure advantage of the reputation earned by the plaintiffs."

The submission of Mr. Tulzapurkar was controverted by Mr. Cooper by urging that the goods manufactured by the plaintiffs and the defendants are totally different and, therefore, there is no cause or apprehension that the use of the word "Bajaj" is likely to cause deception or confusion in the mind of the public. Mr. Cooper submitted that the articles manufactured by the defendants are utensils and those marketed by the plaintiffs are electrical goods or appliances and, therefore, it is unlikely that the purchasers of utensils would be confused by the use of the word "Bajaj" on the articles of the defendants. The learned

counsel submitted that the plaintiffs' goods are sold under registered mark under Class 11, while the goods manufactures by the defendants fall under Class 21. Class 11 refers to installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, and other purposes, while Class 21 refers to small domestic utensils and containers (not of precious metal nor coated therewith). The submission of Mr. Cooper is that as the articles manufactured by the plaintiffs and the defendants are different, the question of deception would not arise. It is not possible to accept the submission. The articles manufactured by the plaintiffs and the defendants are kitchen wares and are commonly used in almost every kitchen in this country. The mere fact that the articles manufactured by the contesting parties are different in nature is no answer to the claim that the defendants are guilty of passing off. We entirely agree with the conclusion recorded by the learned trial Judge that there is identity of the goods, the mark and the consumer and the goods manufactures by both the plaintiffs and the defendants are sold under one shop. Mr. Cooper complained that the electric goods

manufactured by the plaintiffs and the stainless steel utensils manufactured by the defendants are not sold in one shop. The submission is not accurate because it is common experience that kitchen ware or kitchen appliances like mixers, grinders, pressure cookers, and stainless steel utensils are sold in the same shop. At this interim stage, we are not prepared to accept the submission of Mr. Cooper on this count and we see no reason to take different view from that of the learned single Judge on this aspect. In our judgment, prima facie, it is clear that the defendants have intentionally and dishonestly tried to pass off their goods by use of name "Bajaj".

29. He has thereafter relied upon the judgment of this Court in the case of Kirloskar Diesel Recon Pvt. Ltd., and another vs. Kirloskar Proprietary Ltd., and others, reported in AIR 1996 Bombay 149, particularly para 13 thereof which reads as under :-

"13. The expression 'common field of activity' was coined by Wynne-Parry J. in McCulloch v. Levis A. May (Product Distributors) Ltd. popularly known as 'Uncle Mac' case reported in 65 RPC 58 in

which he held that its presence or absence was conclusive in determining whether or not there was passing off. However, the requirement that a 'common field of activity' is conclusive in determining whether there can be passing off has been extensively criticised by Manning J. in the case of *Henderson v. Radio Corp. Pty.* reported in (1969) RPC 218 holding that it would be unsafe to adopt the view expressed in *Mchulloch v. Mary* that what has been called a common field of activity must be established in every case to entitle the plaintiff to succeed. He further held that it is going too far to say that the absence of this so-called common field of activity necessarily bars a plaintiff from relief. With the passage of time, law on requirement of common field of activity in a passing off action has radically changed. There is no requirement for a common field of activity to found a claim in passing off. In *Marage Studies v. Counter Feat Clothing Co. Ltd.*, reported in (1991) FSR 145, Browne Wilkison V-C said that the so-called requirement of the law that there should be a common field of activity is now discredited. The real question in each case is whether there is as a result of misrepresentation a real

likelihood of confusion or deception of the public and consequent damage to the plaintiff. The focus is shifted from the external objective test of making comparison of activities of parties to the state of mind of public in deciding whether it will be confused. With the passage of time and reputation acquired, the trade mark 'Kirloskar' has acquired the secondary meaning and has become almost a household word. The judgements relied upon by Mr. Kane pertain to the cases of one type of business and not where variety of businesses have been carried by the plaintiff and defendant as in the instant case. The business activities of the Respondents vary from pin to piano as borne out from the object clauses of the Memorandums of Association of the Respondents. The Appellants have still to commence their business activities but as mentioned in the Memorandums of Association of 1st Applicant in each appeal some of the object clauses therein overlap with the activities of Respondents and more particularly of Respondents Nos. 6 and 7."

30. Thereafter he has relied upon a judgment of the Division Bench of this Court in the case of

Aktiebolaget Volvo vs. Volvo Steels Limited, reported in 1998 PTC (18 (DB), particularly paras 57, 58 and 60 thereof which read as under :-

"57. On the issue of interlocutory relief Shri Devetri relied upon the decision of the chancery Division reported in 1967 RPC 222 Lyons maid Limited vs. Trebor Limited. He especially relied upon the following observations:

"But, at any time on an application for interlocutory relief, it must, I think be incumbent upon the plaintiff to show that the circumstances are such that, unless he is protected by the Court pending the trial of the action, there is reason to apprehend that he, the plaintiff, will suffer damage, which he ought not to be at risk about, or that there is some reason for maintaining the status quo pending the determination of the issues between the parties.

The defendants here say that the evidence does not disclose any prima facie risk of the plaintiffs suffering any damage whatever, because the dissimilarity of the two articles with which I am concerned, on the one hand, the iced lollipop, and on the other hand, the bit of bubble gum, is such that no one will abstain from buying one of the plaintiffs iced lollipops because he buys instead a piece of bubble gum made by the defendants. So that, even if there is any confusion as to the origin of the two articles and even if, there is any belief on the part of any member of the public that the defendant bubble gum is something to do with the plaintiffs, that will not in any way damage the plaintiffs' business in their iced lollipop. There is no evidence that the defendants product is poor quality or that its association with the plaintiff company, if such association in the minds of the public did occur, would damage the plaintiffs company in that kind of way. So

that the defendants say that the applicants do not make out any case for interlocutory relief".

"58. On the point of balance of convenience also relied upon the decision of the Lt. Single Judge of the High Court of Karnataka reported in AIR 1997 Karnataka I- Kirloskar Proprietary Ltd., and ors. Vs. Kirloskar Dimensions Pvt. Ltd,. & Ors, wherein eventhough the Ld. Judge held that the plaintiffs have made out prima facie case, in paragraphs 35 and 36, the Ld. Judge held as under:

"35. As observed by me earlier the plaintiffs and defendants are not engaged in the common field of activity. The business of the defendant is altogether different from that of the business of the plaintiffs as on the date of the filing of the suit. It is also not the case of the defendants that they have taken any steps to start the business which is being carried on by the plaintiffs.

36. In the decision of the Bombay High Court referred to above the defendants in the said case have not started or commenced their business or trade activities. In the case on hand the defendants have already commenced their business in the year 1990. If the defendants have already commenced and they are carrying on their business it is not appropriate to interrupt their business even before the commencement of the trial in the suit. If the defendants are interrupted in carrying on their business it would cause greater hardship since they would have to again establish the said business in the event of their succeeding at the trial."

"60. On the other hand Shri Tulzapurkar

with very great justification pointed out very peculiar facts of the case and emphasised what the Apex Court in the very Wander Ltd case has observed in paragraph 19 of the judgment which is as under:

"Secondly even if a prior registration of a trademark is not necessarily evidence of prior user as contended by Shri Rao, Antox cannot, prima facie explain how in a passing off action its user subsequent to June 1986 would prevail over the prima facie finding that wander Ltd was manufacturing calcium Gluconate tablets under the trademark "Cal-De-Ce" at its own factory in Bombay from August 1983 to June 1986. The Appellate bench does not dislodge this finding nor does it recognize the crucial effect of prior use by the defendant on the plaintiffs case in a passing off action. It appears to us that it was not an appropriate case where the appellate bench could have interfered with the discretion exercised by the learned Single Judge."

31. He has thereafter relied upon the judgment of this Court in the case of Schering Corporation & others, v. Kilitch Co. (Pharma) Ltd., reported in 1994 I IPLR 1, particularly the following portion:-

" When a Court is called upon to consider granting of interim reliefs, it has to consider several factors. Is the mark visually or phonetically similar? Have the Plaintiffs acquiesced in the Defendants user in such manner as to disentitle them for injunction by result of any equities having evolved in favour of the Defendants? Are

there any other factors disentitling the Plaintiffs from securing interim relief? On all these counts we are of opinion that the Plaintiffs have made a strong prima facie case which has not been rebutted by the Defendants. Indeed, the Defendants' adoption of the mark appears to have been done with a view to taking advantage of the reputation acquired by the Plaintiffs' mark 'Quadridem'. Indeed, one of the factors which must weigh with the Court is the interest of the general public which factor has been repeatedly mentioned by the Supreme Court in several of its decisions. On all considerations, in our opinion, the Plaintiffs were entitled to injunction and we are unable to subscribe to the view of the learned single Judge that by reason of delay the Plaintiffs were not entitled to have the status quo altered."

32. The learned counsel for the plaintiffs has thereafter relied upon the judgment of the Apex Court to draw a close proximity between the two products by relying upon the judgment arising under the Sales Tax Act. He has relied upon the judgment in the case of State of Gujarat v. Prakash Trading Co. reported in AIR 1973 SC 960. He has relied upon the following para in which the word "Toiletry"

is held to be inclusive of both tooth paste and tooth powder.

"Toiletry", according to the dictionary, is an article or preparation used in making one's toilet such as soap, lotion, cosmetic, tooth-paste, shaving cream, cologne etc.". It was further observed by this Court that according to the dictionary meaning, tooth powder was regarded both as an item of cosmetic and toilet and that in common parlance, tooth powder was considered to be an article of toilet. As such, the Court came to the conclusion that tooth powder was a toilet requisite. The reasoning given by this Court in respect of tooth powder in the above cited case, in our opinion, holds equally good for tooth paste. Likewise, the dictionary meaning of the word "toilet" relied upon in the above case, "as an act or process of cleansing of one's person" shows that a tooth brush which is meant for cleansing one's tooth is a toilet article."

33. He has also relied upon another sales tax case being M/s. Sarin Chemical Laboratory vs. Commissioner of Sales Tax, U.P. reported in AIR 1971 SC 65 once again construing the word "toiletry" so as to include all the items which are used in

toilet such as tooth paste, tooth brush, etc.

34. Thereafter the learned counsel for the plaintiffs has turned to the trade relation and/or trade connection of two products and has contended that in the case of *Corn Products Refining Co. vs. Shangrila Food Products Ltd.*, reported in AIR 1960 SC 142 the Apex Court has held that the trade connection or trade relation is sufficient between two products to grant interim injunction from using the same mark. He has particularly relied upon paras 18 and 19 of the said judgment which read as under :-

(18) We also agree with Desai J. that the idea of the two marks is the same. The marks convey the ideas of glucose, and life giving properties or vitamins. The *Aquamatic* case (*Harry Reynolds v. Lafferty's Ltd.*) 1958 RPC 387 is a recent case where the test of the commonness of the idea between two marks was applied in deciding the question of similarity between them. Again, in deciding the question of similarity between the two marks we have to approach it from the point of view of a man of average intelligence and of imperfect recollection. To such a man the overall structural and phonetic similarity and the

similarity of the idea in the two marks is reasonably likely to cause a confusion between them.

(19) It was then said that the goods were not of the same description and that therefore in spite of the similarity of the two marks there would be no risk of confusion or deception. We are unable to accept this contention. It is true that we have to proceed on the basis that the goods are not of the same description for the purposes of S. 10(1) of the Act. But there is evidence that glucose is used in the manufacture of biscuits. That would establish a trade connection between the two commodities, namely, glucose manufactured by the appellant and the biscuits produced by the respondent. An average purchaser would therefore be likely to think that the respondent's 'Gluvita biscuits' were made with the appellant's 'Glucovita' glucose. This was the kind of trade connection between different goods which in the "Black Magic" case (In re: an Application by Edward Hack) 1940-58 RPC 91 was taken into consideration in arriving at the conclusion that there was likelihood of confusion or deception. The goods in this case were

chocolates and laxatives and it was proved that laxatives were often made with chocolate coatings. We may also refer to the "Panda" case (In re: an application by Ladislav Jellinek) 1946-63 RPC 59. The goods there concerned were shoes and shoe polishes. It was observed that shoe polishes being used for shoes, there was trade connection between them and that this might lead to confusion or deception though the goods were different. The application for registration was however refused under that section of the English Act which corresponds to S. 8 of our Act on the ground that the opponents, the manufacturers of shoes, had not established a reputation for their trademark among the public."

35. He has thereafter relied upon the judgment of this Court in the case of Mahindra & Mahindra Ltd, vs. Mahendra & Mahendra Paper Mills Ltd., reported in 1999 Intellectual Property Cases, Vol. 4 No. 1 page 22, particularly the portion of para 6 of the judgment :-

"In the case of trading name under which diversified business activities are carried on and such trading name has acquired

secondary meaning - almost a household word - the complaining plaintiff would ordinarily succeed if the defendant has adopted identical or similar trading name even if common field of activity is relevant consideration but lack of it shall not non-suit the plaintiff in passing off action. It is more than settled legal position that common field of activity is not required to be established by the complaining plaintiff as passing off action. Equally settled legal position is that in passing off action, plaintiff does not have to establish fraudulent intention on the part of the defendant. It is not even necessary to prove actual confusion. Likelihood or probability or possibility of confusion or deception is sufficient."

36. He has also drawn my attention to the fact that the judgment in the case of Mahindra & Mahindra Ltd, (supra) delivered by the learned Single Judge has been affirmed by the Supreme Court in the case of Mahendra & Mahendra Paper Mills Limited vs. Mahindra & Mahindra Ltd., reported in 2002 (24) PTC 121 (SC). He has also drawn my attention to the judgment of the Allahabad High Court in the cases of Bata India Limited v. M/s. Pyare Lal & Co. reported in AIR 19885 Allahabad 242. He has also

pointed out that the aforesaid judgment of Bata India (supra) and Kirloskar Diesel (supra) both are affirmed by the Apex court in paras. 21 and 22 of the aforesaid judgment.

37. Thereafter he has relied upon the judgment of the learned Single Judge of this Court in the case of M/s. Eagle Potteries Private Ltd,. v. M/s. Eagle Flask Industries Pvt. Ltd., reported in AIR 1993 Bombay 185, particularly paras. 40 and 43 of the said judgment read as under :

"40. Mr. Daruwalla also relied upon the passage from Kerly's Law of Trade marks and Trade Names, 12th Edition, paras 10-12 which is as under :-

"The test to be applied:

The test whether or not goods or services are "of the same description" would seem to be supplied by the question -- Are the two sets so commonly dealt in by the same trader that his customers, knowing his mark in connection with one set and seeing it used in relation to the other, would be likely to suppose that it was so used also to indicate that they were his? The matter should be looked at from a business and commercial

point of view. As Viscount Dunedin said in the "Nuvol." "The material consideration arising in connection with the registration of trade marks are practical." To the cases on this subject, the oft-quoted proposition that each was decided on its own facts is peculiarly applicable and the observations below should be read with this in mind.

It would seem clear that, before goods or services can be of the same description, there must be a description that covers both, although this is not a sufficient test for a description may be too wide to be usable.

In "Panda" Romer J. classified the various matters to be taken into account in deciding whether goods are goods of the same description into three classes--

- (a) the nature and composition of the goods;
- (b) the respective uses of the articles;
- (c) the trade channels through which the commodities respectively are bought and sold.

Mustard and semolina were not goods of the same description; although they were sold side by side in the same shops and both could be properly treated as articles of food, both being used in cooking, their real nature was different, "one falling under the description of a condiment and the other under the description of a cereal":

As between goods on the one hand and services on the other, the question is whether or not they are "associated"; and by statutory definition this is so if (and, it would seem, only if);

"it is likely that those goods might be sold or otherwise traded in and those services might be provided" by the same business, and so with descriptions of goods and descriptions of services."

The first part of this definition is clear, the reference to "descriptions" of goods and services less so. Fortunately, the need to compare a description of goods with a description of services, as distinct from comparing particular items within those descriptions, should rarely if ever arise."

"43. From the above authorities and the commentary, the following proposition emerges, i.e. each case has to be decided on its own particular facts. In all cases of this kind, nature and composition of goods, their respective uses and functions and trade channel through which they have been marketed and sold have to be considered. Depending on the goods in question, one or two of these characteristics may have greater significances or emphasis on the other. The matter must be considered in a business

sense. Also it must be remembered that the said Act has been enacted to ensure that the registered proprietor of mark has a monopoly right to that mark. Sections 46 and 56 are part of the Legislation and are thus subject to the incident of this legislation. The question, therefore, whether or not goods are of the same description must necessarily be answered in the context of that purpose and the goods of the same description must not be given a restrictive construction. In any event the goods of the same description cannot be restricted to goods which are substantially analogous and must include goods which are commonly used as substitute or alternate for one another."

38. The learned counsel for the plaintiffs has also relied upon the judgment of the Division Bench of this Court in the case of Kamal Trading Co. Bombay and others vs. Gillette U.K. Limited, Middle Sex, England, reported in 1988-PTC-1). He has particularly relied upon the following para:-

"Relying on this observation; Mr. Desai submitted that the plaintiffs have not established any of the conditions required for grant of interim relief. It was submitted that the goods manufactured by the plaintiffs and the defendants are different nature; the plaintiffs manufacture blades, while the defendants manufacture "tooth brushes". The goods of the plaintiffs and the defendants are available in the same shop and the customers of these goods are different. The goods sold by the plaintiffs are blades and fall in Class 8, while those

of the defendants are tooth brushes which fall in class 21. Relying on these circumstances, it is contended that there was no likelihood of any deception. We are unable to see any merit in this submission. In the first instance, the assumption of the learned counsel that the class of customers for purchase of safety blades and tooth brushes are different and these goods are not available in the same shops is wholly misconceived. We take judicial notice of the fact that these goods are available in every shop including a small shop and each and every person is required to purchase these goods. The safety blades and tooth brushes are items of daily requirement and are required by every person. It is impossible to accept the submission that as the goods being different and as goods are set out in different Classes in the Schedule to the Act, there is not any likelihood of customer being deceived."

39. Lastly, in support of the aforesaid contention he has relied upon an unreported judgment delivered by me in the case of Indiacom Limited Vs. Tata Teleservices Ltd., and ors. decided on 28.10.2005 in Notice of Motion No. 1837 of 2003 and he has relied upon particularly the following para

"Even if the aforesaid judgement has considered the law at the ad-interim stage, but independently also I am of the opinion that in view of the judgment of this Court in the case of Bajaj Electricals Limited, Bombay vs. Metals & Allied Products, Bombay and another, reported in AIR 1988 Bom. 167, the Judgment of another Division Bench in the case of Kamal Trading Co. Bombay and others, vs. Gillette U.K. Limited, Middle Sex, England, reported in 1988 The Patents and Trade Marks Cases, Volume-VIII page 1 and the judgment of the learned Single Judge in the case of Kirloskar Diesel Recon Pvt. Ltd., and another vs. Kirloskar Proprietary Ltd., and others, reported in AIR 1996 Bom. 149, I am of the view that the law as far as this Court is concerned in relation to the cognate goods is well settled that the action of a passing off is maintainable not only in respect of same goods but also in respect of cognate goods. The aforesaid judgements take a view that in cases of the goods which are related to each other though may not be the same goods but the goods is covered by the same class or covered in the same field, a passing off action is

maintainable by the plaintiff to protect his mark and an injunction can be granted. What is a related field and what is the cognate goods is of course a question of fact to be decided on facts of each case."

40. By relying upon the aforesaid judgments, the learned counsel appearing for the plaintiffs has contended that the goods which are manufactured by the plaintiffs and the defendants are allied products like tooth paste and tooth brush, the same are cognate goods and are associate goods and are complementary goods. He has further contended that they are sold in the same shops in the market under the same roofs and are related to toiletry product and thus fall in a common field of activity and, therefore, this Court must grant injunction in so far as the passing off is concerned in respect of the goods belonging to the defendants being Ajanta Tooth paste. The learned counsel has contended that in so far as the reputation of Ajanta is concerned in relation to tooth brush, the same is unchallenged, and thus, the plaintiffs are entitled to injunction in respect of the related or cognate goods of tooth paste in relation of the same brand Ajanta.

41. Mr. Chinai, the learned counsel appearing for the defendants on the other hand has vehemently

contended that the present notice of motion is liable to be dismissed. In his submission the plaintiffs have made out no case whatsoever for grant of any interim injunction. It has been submitted that in so far as the question of passing off is concerned, based on the fact that the plaintiffs are prior users of the brand 'Ajanta' in relation to tooth paste because of their prior entry in the market is concerned in his submission plaintiffs have not been able to establish any reputation in the market for 'Ajanta' brand tooth paste. It has been submitted by him that in so far as the tooth paste sales are concerned, in fact there has been no commercial use of trade mark 'Ajanta' in respect of said tooth paste because there has been almost no sale of the said item. It has been submitted that prior to the defendants coming into the market on 28.12.2002 there has been no substantial sale of any goods of tooth paste under brand Ajanta by the plaintiffs so as to have acquired any reputation in respect of the said brand. It has been submitted that prior user is specifically based on six alleged unnumbered invoices purporting to show a sporadic sale of a small quantity of 980 tooth pastes of the total aggregating value of Rs. 10,780 in a period of six months and that also to six stockists. It has been submitted that the perusal of the invoices at H1, H2, and H3 to the plaint indicates that there was a

sale only of 560 tubes. It has been further submitted that on the evidence produced by the plaintiffs also it is clear that between the period August to November 2002 there was no sale of the tooth paste by the plaintiffs with the trade mark Ajanta and thus such a sporadic sale in the market cannot be treated as prior user of the mark so as to acquire a reputation which must be protected by this Court by grant of an injunction in a "passing off" action. He has further submitted that even the said sales which have been relied upon are only with a view to prevent the defendants who had already announced their entry in the market from entering in the market for sale of Ajanta brand tooth paste. The learned counsel has submitted that such action with a view to preventing an entry of rival product cannot be treated as a bonafide sale so as to obtain an injunction on the ground of prior user in a "passing off" action. Even in respect of the aforesaid sales he has submitted that apart from the fact that there are only sporadic sales there is no material disclosed by the plaintiffs to establish that in fact the sales were effected by the dealers actually in the market of the Ajanta brand tooth paste during the entire period prior to December 2002. Only two advertisements have been relied upon by the plaintiffs which are supposed to have been given on 16th and 18th December, 2002. It has been further emphasised by the learned counsel for the

defendants that during the period 11.1.2003 to July 2003 in fact the plaintiffs themselves have not relied upon any sales figures. It has been submitted that thus in fact till July 2003 the plaintiffs were not in market at all selling the said Ajanta brand tooth paste. It has been further submitted that thus invoices on which reliance has been placed by the plaintiffs cannot inspire confidence of the Court as they are obviously false invoices so as to indicate a false prior user of the said tooth paste brand Ajanta. It has been submitted by the learned counsel for the defendants that only intention of the plaintiffs were to create false evidence of a prior user and threaten the defendants for filing a "passing off" action. In his submission this was with a view to extort the money from the defendants. It has been submitted by the learned counsel for the defendants that the averments made by them in the reply affidavit indicates stunning facts of the plaintiffs as indulging in such frivolous action. He has further submitted that there was a raid by the Sales Tax Authorities on the premises of the dealers of the plaintiffs namely National Starch Products and it was disclosed that the entire stock of tooth paste sent to them was not sold in the market but was lying in their possession even after considerable period of time of so called sale. It has been further contended that the plaintiffs themselves

have not paid any sales tax on such sales of tooth paste during the period of June 2002 to January, 2003. It has been further contended that one of the employees of the stockists Rajawat & Sons has filed an affidavit stating that though the goods were received by the said dealer from the plaintiffs still not a single sale took place in the market of the said tooth paste under the brand Ajanta sold by the plaintiffs. Lastly, the learned counsel for the defendants has relied upon a survey carried out by AC Nielsen ORG Marg who has by its letter dated 3.3.2003 confirmed that they conducted a monthly sample survey of over 5 million retail outlets in India and they did not find any product under the brand name Ajanta for tooth paste, shaving cream and shampoo prior to December, 2002.

42. It has been contended that there has been in fact no sale in the market of the Ajanta tooth paste belonging to the plaintiffs prior to December, 2002 and, therefore, the contention raised that they are prior users is frivolous and bogus. Alternatively, the learned counsel for the defendants has contended that assuming that the aforesaid submissions made by him are erroneous still such a limited sale of 980 tooth pastes during the period from June 2002 to December 2002 cannot create any such acquisition of good will or reputation in the trade mark Ajanta so as to enable this Court to grant an injunction

restraining the defendants from selling their product of the tooth paste under the brand name 'Ajanta' in a "passing off" action. It has been contended that such a sale is a casual, intermittent or experimental sale and thus insufficient to show an intention to adopt the mark Ajanta for tooth paste by the plaintiffs. It has been thus contended that there is no substance whatsoever in the case of prior user pleaded by the plaintiffs and, therefore, the action of "passing off" initiated on the said ground must fail. He has relied upon the judgment of this Court in the case of Consolidated Foods Corporation vs. Brandon and Co. Pvt. Ltd., reported in AIR 1965 Bombay 35, particularly para 28 thereof which reads as under :-

"28. Going back to the facts of this case, the Mark, "Monarch" is undoubtedly an old one so far as the petitioner corporation is concerned, in as much as it has been using it on its food products for long many years and in several countries of the world. But so far as this country is concerned, it was a new one at the time when it first imported its products with that mark and being a distinctive (Per se) mark, it acquired a right to use it to the exclusion of all others, and became entitled to resist registration thereof by any one else. As a

matter of fact, the petitioner corporation could have straightaway applied for registration of the mark -- without ever using it on its goods in this country under Section 14 of the Act of 1940 corresponding to Section 13 of the Act of 1958 as a mark proposed to be used by it in connection with its products. As it happened, however, the petitioner corporation did not make any application for the registration of the mark "Monarch" in this country in spite of its having imported the goods as shown by the affidavits and evidence on record between the years 1947 and 1950 and from 1955 to 1957. This, however, does not disentitle the petitioner corporation to claim the proprietorship of the mark "Monarch" as being the first to have introduced that mark in this country in connection with its food products. For the purpose of claiming such proprietorship, it is not necessary, as already stated, that the mark should have been used for considerable any length of time. As a matter of fact, a single actual use with intent to continue such use *co instanti* confers a right to such mark as a trade mark. It is sufficient if the article with the mark upon it has actually become a vendible article in the market with intent

on the part of the proprietor to continue its production and sales. It is not necessary that the goods should have acquired a reputation for quality under that mark. Actual use of the mark under such circumstances as showing an intention to adopt and use it as a trade-mark is the test rather than the extent or duration of the use. A mere casual intermittent or experimental use may be insufficient to show an intention to adopt the mark as a trade mark for specific article or goods. Applying those principles to the facts of the case, I am firmly of the view that the petitioner corporation which on the affidavits and evidence is shown to have extensive sales of its food products in many countries of the world under the mark "Monarch" which is also registered as a trade mark in several of these countries, did import its food products into this country under the mark "Monarch" for the first time in 1947 as deposed to by Rustom and evidenced by the entries in his invoice book and also in 1949 as stated by Cambatta in his affidavit and evidenced by the invoice and bill of lading produced by him. Admittedly, the respondent company had not used this mark "Monarch" at any time prior

to the dates of these two consignments. Accordingly, I hold that the petitioner corporation was the first to introduce and use the mark "Monarch" in connection with and on its food products in this country and that, therefore, it was entitled to claim the mark "Monarch" as proprietor thereof. That these imports were not sporadic or experimental or casual is supported by the fact that after a lapse of about five years, further products were imported into this country bearing the mark "Monarch" right from April, 1955 at least to the date of the applications made by the respondent company for registration of the mark. These further imports do indicate that at the time when these products were imported in 1947 and 1949 the petitioner corporation did intend to continue the imports of its food products into this country subject, of course, to such restrictions as to imports as the Union Government imposed from time to time. This intention on the part of the petitioner corporation is further indicated by the fact that it has been continuously selling its products in different parts of the world even down to date and, but for the restrictions on imports of foreign food products imposed by the Union Government and

the difficulties experienced by traders in getting licenses from the Government for importing such products, the food products manufactured and marketed by the petitioner corporation could very well have found their way into this country without any hiatus even during the period between 1949 and 1955. In my opinion, therefore, there is no doubt that the petitioner corporation did acquire by reason of the imports of its food products bearing the mark "Monarch" into this country during the period 1947-49, as sufficiently proved in this case, a right to the trade mark "Monarch" even in this country,. The respondent company, as admitted in the affidavit filed on its behalf and as stated in the applications for registration of the mark, did not start using this mark at any time prior to the year 1951 on the food products sold by it. Accordingly, between the two users of the mark "Monarch" in this country, the petitioner corporation had a priority both in adoption of the mark and in the user thereof and, therefore, the respondent company was not entitled to claim the mark as a proprietor, and apply for registration thereof. For these reasons, I would set aside the order passed by the Joint

Registrar of Trade Marks directing the respondent company's applications for registration of the mark "Monarch" to proceed to registration."

Thereafter he has cited the judgment of the Apex court in the case of Uniply Industries Ltd., vs. Unicorn Plywood reported in ((2001) 5 SCC 95 and contended that a very limited or sporadic prior user cannot give a right or create any reputation in the particular mark. He has particularly relied on para 9 of the said judgment which reads as under :-

"9. Some courts indicate that even prior small sales of goods with the mark are sufficient to establish priority. The test being to determine continuous prior user and the volume of sale or the degree of familiarity of the public with the mark. Bona fide test of marketing, promotional gifts and experimental sales in small volume may be sufficient to establish a continuous prior use of the mark. But on some other occasions courts have classified small sales volume as so small and inconsequential for priority purposes. Therefore, these facts will have to be thrashed out at the trial and at the stage of grant of temporary injunction a strong prima facie case will

have to be established. It has also to be borne in mind whether the appellant had also honestly and concurrently used the trade marks or there are other special circumstances arising in the matter. The courts below have merely looked at what the prima facie case is and tried to decide the matter without considering the various other aspects arising in the matter. Therefore, we think, the appropriate order to be made is that injunction either in the favour of the appellant or against them or vice-versa is not appropriate and the proceedings in the suit shall be conducted as expeditiously as possible or the Registrar under the Trade and Merchandise Marks Act, 1958 may decide the matter which may govern the rights of the parties."

Thereafter he has relied upon the judgment delivered by me in Notice of Motion No. 3232 of 2005 delivered on 27.10.2005 in the case of Macleods Pharmaceuticals Ltd, vs. Tidal Laboratories P. Ltd., & Anr. He has in particularly relied upon para. 6 of the said judgment. In the aforesaid judgment I have taken a view that the test of prior user which is required to be satisfied in passing off action must be by showing that in fact by virtue of the sale in the market of the goods belonging to

the plaintiff the mark has become so well known in the market that the defendant has sought to adopt the said mark with an intention to pass off his goods as that of the plaintiffs. By relying upon the aforesaid authority it has been contended by the learned counsel for the defendants that for a passing off action the plaintiff must show that the disputed mark or get up has by user acquired a distinctiveness with the goods of the plaintiff so that use thereof in relation to any other goods of the kind dealt in by the plaintiff would be understood by the trade and public as meaning the goods belonging to the plaintiff. He has also placed reliance upon the judgment of the Apex Court in the case of *Laxmikant V. Patel vs. Chetanbhai Shah*, reported in (2002) 3 SCC 65, particularly para. 12 thereof which reads as under :

"12. In *Oertli v. Bowman* (at p. 397) the gist of passing-off action was defined by stating that it was essential to the success of any claim to passing-off based on the use of given mark or get-up that the plaintiff should be able to show that the disputed mark or get-up has become by user in the country distinctive of the plaintiff's goods so that the use in relation to any goods of the kind dealt in by the plaintiff of that mark or get-up will be understood by the

trade and the public in that country as meaning that the goods are the plaintiff's goods. It is in the nature of acquisition of a quasi-proprietary right to the exclusive use of the mark or get-up in relation to goods of that kind because of the plaintiff having used or made it known that the mark or get-up has relation to his goods. Such right is invaded by anyone using the same or somewhat deceptively similar mark, get-up or name in relation to goods not of plaintiff. The three elements of "passing-off" action are the reputation of goods, possibility of deception and likelihood of damages to the plaintiff. In our opinion, the same principle, which applies to trade mark, is applicable to trade name.

He contends that in the present case no such test laid down by the Apex Court as well as by this Court has been satisfied. It has been contended that the record does not indicate that the plaintiffs have acquired any distinctiveness in respect of the user of the mark Ajanta in relation to his tooth paste nor the plaintiffs have acquired any reputation in the mark 'Ajanta' because of almost non-user of the said mark since there was no sale in the market except 980 tubes worth Rs. 10,078. It has been

further submitted that such a small sale is too negligible to indicate that the mark Ajanta has become distinctive by user of the same by the plaintiffs in respect of their tooth paste before the defendants entered into the market or even as on the date of the filing of the suit.

43. It has been submitted that as against the aforesaid position in the case of the defendants though they entered into market on 28.12.2002 but by 14.2.2003 when the suit was filed they have already sold tooth paste tubes worth Rs. 32,79,163.49 and by the end of February 2003, the sale of the defendants tooth paste rose to Rs.100 lacs and today they are manufacturing and selling tooth paste almost 3 lacs per day. It has been further submitted that the report of AC Nielsen - ORG Marg indicates that the defendants are having almost 6% market share for tooth paste whereas the plaintiffs are not at all in the market. It has been submitted that since there was no ad interim orders both the plaintiffs and the defendants have been selling the goods in the market under the brand Ajanta whereas the defendants sale has risen sharply the plaintiffs' sale has almost come to an end. In the aforesaid circumstances, the learned counsel for the defendants has submitted that the plaintiffs are not entitled to the injunction of passing off on the basis of prior user of the mark 'Ajanta' in relation

to tooth paste because they have entered into the market earlier in point of time. He has submitted that such an injunction cannot be granted in the light of the authorities cited hereinabove and in light of the fact that the plaintiffs had almost insignificant sale during the period when they were in the market prior to the defendants herein.

44. The learned counsel for the defendants submits that even assuming that the plaintiffs are entitled to maintain the passing off action on the basis of their sporadic sale and claim of prior user still this Court should not grant any injunction order it is because there is no intention of the defendants to pass off their goods as belonging to the plaintiffs. It has been submitted that it is well settled that for the purpose of passing off action it must be shown that the goods which are sold in the market by the defendants are with the intention to pass off the goods as if the same are belonging to the plaintiffs and with a view to encash the reputation earned by the plaintiffs in respect of their mark. It has been submitted that for the purpose of aforesaid the get up of the packet and physical appearance of packet with its colour scheme and the style in which the word mark is written is required to be compared so as to arrive at the conclusion as to whether the defendants are passing off their goods as that

belonging to the plaintiffs. He has submitted that the word mark 'Ajanta' being identical is not by itself sufficient to establish the claim of the plaintiffs for a passing off action but the plaintiffs must indicate that apart from the trade mark, get up and physical appearance of the packet in which the goods are sold by the plaintiffs and the defendants is so similar or deceptively similar so as to create an impression in the minds of the people that the goods belonging to the defendants are the goods belonging to the plaintiffs herein. He has thus submitted that in the present case, there is a distinctiveness in respect of the packets and get up thereof and in that light of the matter the plaintiffs are not entitled to injunction. In support of the aforesaid contention he has relied upon the judgment of the Apex Court in the case of Durga Dutt Sharma vs. N.P. Laboratories, reported in AIR 1965 SC 980 particularly para 28 thereof which reads as under :-

"(28) The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basic differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an

action complaining of an infringement of a registered trade mark. We have already pointed out that the suit by the respondent complained both of an invasion of a statutory right under S. 21 in respect of a registered trade mark and also of a passing off by the use of the same mark. The finding in favour of the appellant to which the learned Counsel drew our attention was based upon dissimilarity of the packing in which the goods of the two parties were vended, the difference in the physical appearance of the two packets by reason of the variation in their colour and other features and their general get-up together with the circumstance that the name and address of the manufactory of the appellant was prominently displayed on his packets and these features were all set out for negating the respondent's claim that the appellant had passed off his goods as those of the respondent. These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered proprietor who has a statutory right to that mark and who has a statutory remedy in the event of the use by another of that mark or

a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of "the exclusive right to the use of the trade mark in relation to those goods" (Vide S. 21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but

where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff."

Relying upon the aforesaid principles laid down by the Apex Court, the learned counsel for the defendants has contended that in the present case the packages of the plaintiffs and the defendants are totally distinct and cannot be treated as one which could be creating an impression in the minds of the people that the goods belonging to the plaintiffs are being sold by the defendants. He has

submitted that the word mark 'Ajanta' appearing on the plaintiffs package and the defendants package the font and type thereof on both the packages are distinct and different. The style of writing is different. He has further submitted that on the packet the name of the manufacturer being the 1st defendant herein is prominently displayed along with the address. He has further contended that the defendants product prominently contains a blue emblem of Dentofresh whereas plaintiffs packet does not contain any such emblem. It is further brought to my notice that in respect of the plaintiffs goods on a packet there is a photograph of a Mother and Son and this photograph is a hall mark of their product as it contained in every advertisement issued by the plaintiffs as well as on every packet whether it is of a tooth paste or a tooth brush and thus it has acquired a distinct association with the goods belonging to the plaintiffs, such feature / photograph is absent on the defendants packet. According to him the aforesaid distinction in respect of the packages of both the items of both the goods belonging to the plaintiffs and the defendants is of great significance to arrive at the conclusion whether the defendants are seeking to pass off the goods as if they are belonging to the plaintiffs. In his submission the packet and get up thereof are nowhere similar and therefore passing of action must fail.

45. The learned counsel has thereafter contended that in fact there was no ad-interim order in the present case and thus the defendants were permitted to sell their goods in the market for the last two years. The sale figures have reached almost Rs. 146 crores and the defendants have acquired 6% market share in respect of tooth paste market. According to him therefore, the plaintiffs are not entitled to injunction. In his submission ultimate test is whether in fact the defendants have passed off their business as that of plaintiffs or not. He submits that sale figures indicate that on one hand the defendants have acquired a huge market sale of their own goods whereas on the other hand the plaintiffs have almost insignificant sale in the market of their product thus the action of passing off can not be maintained. He has further contended that the plaintiffs have failed to produce any actual evidence of actual deception or actual confusion . In light of the judgment of the Bombay High Court in the case of Carew Phipson vs. DeeJay Distilleries Pvt. Ltd., reported in AIR 1994 Bom 231, particularly para 6 thereof, the plaintiffs are not entitled to any interim orders in absence of any such evidence produced of actual confusion in the market. The said para 6 of the judgment which has been strenuously relied upon by the learned counsel for the defendants is reproduced as under :-

"6. Even on comparison of the trade mark of the plaintiffs with the defendants' trade mark, it is difficult to hold that the two marks are deceptively similar and are likely to create any confusion in the minds of the customers. In *Parker Knoll v. Knoll International Ltd.*, (1962) RPC 265 Lord Denning explained the words "to deceive" and the phrase "to cause confusion" as follows:

"Secondly, 'to deceive' is one thing. To 'cause confusion' is another. The difference is this: When you deceive a man, you tell him a lie. You make a false representation to him and thereby cause him to believe a thing to be true which is false. You may not do it knowingly, or intentionally, but still you do it, and so you deceive him. But you may cause confusion without telling him a lie at all, and without making any false representation to him. You may indeed tell him the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so."

The tests for comparison of the two word marks were formulated by Lord Parker in *Planotist Co. Ltd.'s application* (1906) 23 RPC 774 as follows :

"You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must

consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion - that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods -- then you may refuse the registration, or rather you must refuse the registration in that case."

On comparison of the two marks bearing the aforesaid principles in mind, it is difficult to appreciate as to how there is even a remote possibility of any customer being misled. In my opinion, when a customer goes to a shop to buy the plaintiffs' product, he will not ask for "Duet" or "Gin N Lime" or "Gin N Orange" but he will ask for a "Blue Riband Gin N Lime" or "Blue Riband Tango Gin N Orange". Further having regard to the fact that the customer who is likely to buy the products of the plaintiffs and the defendants will be normally educated and discerning type, it is impossible to hold that there is any likelihood of confusion. It is pertinent to note that the plaintiffs have failed to cite even a single instance showing that there was confusion in the minds of the customers.

The absence of evidence of actual deception is a circumstance which definitely weighs in favour of the defendants. It is also necessary to mention that the defendants have produced on record voluminous evidence showing that such premixtures are sold by several other companies under the names "American Extra Dry Gin with Lime Duet Plus", "Forbes Two in One Dry Gin & Lime", "Rainbow Gemlet Gin & Lime" etc. In my opinion, there is no possibility of any confusion in this case at all."

46. Apart from the aforesaid, the learned counsel for the defendants has also pressed into service the additional contentions to claim that the plaintiffs are not entitled to any interim orders. It has been contended that the defendant no. 2 is a proprietor of a trade mark Ajanta in relation to tooth paste from 1990. It has been further contended that the mark Ajanta in class 3 was advertised in the Trade Mark Journal and the plaintiffs filed no opposition to its registration and allowed the defendants to acquire the proprietary rights in respect of the said mark and thus, the plaintiffs are not entitled to any interim relief. The learned counsel for the defendants has relied upon the judgment of the Delhi High Court in the case of P.M. Dissels Pvt. Ltd., vs. Thukral

Mechanical Works, reported in AIR 1988 Delhi 282 and my judgment and order dated 27.10.2005 in Notice of Motion NO. 3232 of 2005 in the case of Macleods Pharmaceuticals Ltd., vs. Tidal Laboratories P. Ltd., & Anr. (supra). By relying upon the aforesaid judgments it has been contended that the fact that the defendants are registered proprietors of trade mark is a relevant factor which is required to be taken into consideration and, therefore, the plaintiffs should not be given any interim order.

47. The next contention advanced by the learned counsel for the defendants is that the adoption of the mark 'Ajanta' by the defendants is bonafide and in good faith. The 2nd defendant is registered proprietor of trade mark 'Ajanta' since 1971 in relation to clocks and time pieces and has acquired a national and international reputation in the mark 'Ajanta' in relation to clocks and time pieces and, therefore, the plaintiffs are not entitled to prevent the defendants from using the said mark. It has been further contended that the registration was applied and obtained as far back as in 1990 without any objection from the plaintiffs and merely because the plaintiffs have applied to rectify the mark will not entitle the plaintiffs to maintain the "passing off" action. It has been further contended that even on equities, the defendants are entitled to continue the sale of the said products under brand

name 'Ajanta' because the defendants had commenced the construction of its plant at Morbi in Gujarat to manufacture FMCG products right in January 2002 and has invested around Rs. 10 crores on land, building and equipments which was much prior to the plaintiffs coming in market with their tooth paste under the same brand. The plaintiffs have no manufacturing facility and are relying upon the manufacture of products by a third party known as Alps Containers Pvt. Ltd., It has been thus contended that the defendants adoption of the mark in respect of tooth paste is honest and bonafide and, therefore, the defendants are entitled to use the said mark. It has been further contended that the registration of the mark of the plaintiffs in Class 3 does not pertain to the tooth paste because it was not registered for dentifrices but was registered only for non medicated toilet preparations, cosmetics and perfumes. Thus plaintiffs are not entitled to extend its registration in respect of the goods falling in the other classes or goods falling in the same class but under discription for which there is no registration. In support of his aforesaid contention he has relied upon the judgment of the Apex Court in the case of Vishnudas Trading vs. Vazir Sultan Tobacco VST, reported in (1997) 4 SCC 201, particularly para. 48 of the said judgement which reads as under :-

"48. The "class" mentioned in the Fourth Schedule may subsume or comprise a number of goods or articles which are separately identifiable and vendible and which are not goods of the same description as commonly understood in trade or in common parlance. Manufactured tobacco is a class mentioned in Class 34 of Fourth Schedule of the Rules but within the said class, there are a number of distinctly identifiable goods which are marketed separately and also used differently. In our view, it is not only permissible but it will be only just and proper to register one or more articles under a class or genus if in reality registration only in respect of such articles is intended, by specifically mentioning the names of such articles and by indicating the class under which such article or articles are to be comprised. It is, therefore, permissible to register only cigarette or some other specific products made of "manufactured tobacco" as mentioned in Class 34 of Fourth Schedule of the Rules. In our view, the contention of Mr. Vaidyanathan that in view of change in the language of Section 8 of the Trade Marks Act as compared to Section 5 of the Trade Marks

Act, 1940, registration of trade mark is to be made only in respect of class or genus and not in respect of articles of different species under the genus is based on incorrect appreciation of Section 8 of the Trade Marks Act and Fourth Schedule of the Rules.

48. On the basis of the aforesaid judgement he has contended that the claim of the plaintiffs for injunction on the basis of prior user of the mark Ajanta in relation to tooth paste is unsustainable in law and cannot be granted by this Court and the action for injunction based on the aforesaid contention must fail and rejected by this Court.

49. While dealing with the alternative argument advanced by the learned counsel for the plaintiffs, the learned counsel for the defendants has contended that in so far as the question of acquiring good will in Ajanta tooth brush is concerned, there is no dispute that Ajanta tooth brushes were sold in the market by the plaintiffs since 1958 and thus have acquired a great reputation in the brand name 'Ajanta' vice versa in respect of the said product of tooth brush. However, it has been contended that acquisition of reputation in Ajanta tooth brush cannot entitled the plaintiffs to claim injunction in relation to Ajanta tooth paste manufactured and

sold by the defendants in the market. It has been submitted that the theory of cognate goods or the same class of activity which has been advanced by the learned counsel for the plaintiffs does not apply to individual case or a person who have acquired reputation in only one particular product. He has further submitted that for the purpose of seeking an injunction on the basis of cognate or associated goods the plaintiffs have to produce actual evidence of confusion by virtue of the fact that they are cognate goods, It is contended that the theory of passing off by the plaintiffs in respect of different products only applies when the plaintiff have acquired not only reputation in one product but it applies when such reputation of the plaintiffs is so huge so as to have acquired reputation transborders and/or transproducts. Thus in his submission unless a brand name has acquired a globe reputation or reputation in a different class and items of product so as to lead to belief that the party who adopts the mark of such a reputed brand would be characterised as passing off his business as that of the business of the plaintiffs an injunction cannot be granted. It is thus submitted that the mere acquisition of a reputation in one particular product even if big enough is not sufficient to grant an injunction in respect of passing off the goods which are distinct and different in nature.

50. The learned counsel for the defendant has contended that the present case falls in two categories. One where the person is holding a brand which has acquired super-status and is known as super-brand and/or global brand and such brand which has a global reputation transcends individual products/business and national territories and it encompasses a variety of products and business and its good will is known in the world. It has been his case that the plaintiffs in the present case cannot claim any such status as admittedly the plaintiffs' mark has been used only for one product 'tooth brush' and is not even known in the international market. He has contended that the judgment cited by the learned counsel for the plaintiffs in the cases of Kirloskar Diesel Recon Pvt. Ltd., vs. Kirloskar Proprietary Ltd., (supra), Mahindra & Mahindra Ltd., vs. Mahendra Paper Mills Ltd., (supra), Kamal Trading Co. vs. Gillette UK Ltd., (supra), Aktibolaget Volvo vs. Volvo Steels Ltd., (supra) and Bajaj Electricals Ltd., vs. Metals & Allied Products Ltd., (supra) are all judgments pertaining to the brand which has acquired international status and/or repute and even dealing with varied products and had acquired a reputation in the brand name in such a large number of products that their business required to be protected because otherwise a person could pass off

his goods by taking advantage of business and good-will of such a person holding such international brand. He has contended that the contention of the plaintiffs that the goods belonging to the plaintiffs are cognate and associated goods and thus the defendants are required to be enjoined from disposing off their tooth paste under brand name 'Ajanta' cannot be accepted on the aforesaid principle because a case for such a brand reputation is neither pleaded by the plaintiffs nor the same is made out by any concrete evidence. It has been further contended that in the aforesaid judgments which are relied upon by the plaintiffs where there is an off the cuff observation about the product available in the same shop and through the same channel although of the different products, must be treated as irrelevant and unnecessary in the light of the main ratio of the judgment that such a brand has acquired a super-brand status and/or universal brand status and thus entitled to the protection of the said brand against all persons even if they are manufacturers of different products.

51. In so far as the associated or complementary products are concerned, it has been submitted that the tooth paste is not closely similar to the tooth brush. It has been submitted that the buyer will not buy the tooth paste believing it to be a tooth

brush, nor can tooth brushes be used as substitutes/alternates for toothpaste and vice versa. It has been further submitted that merely because the goods are complementary to each other it cannot be treated as cognate or similar products. The learned counsel for the defendants has thereafter submitted that even if the Ajanta tooth brush has acquired a reputation whether such reputation could be extended to tooth paste is required to be established and in his submission the plaintiffs have failed to establish that the mark 'Ajanta' on tooth paste of the defendants is likely to confuse or deceive the people in the trade and market into believing that such tooth paste is manufactured or marketed by the plaintiffs. In support of the aforesaid contention he has relied upon the judgment of the Privy Council in the case of Thomas Bear & Sons Vs. Prayag Narain reported in AIR 1940 PC 86. He has on the aforesaid basis contended that it has been well settled that in case of cognate or a similar product, the actual evidence of deception and/or confusion must be established for grant of injunction even at the interim stage. The learned counsel has relied upon the following observations of the Privy Council:-

"If a manufacturer of a special kind of smoking tobacco under a trade mark seeks to restrain the use of it on cigars, or on a

very different kind of smoking tobacco, or on cigarettes, or on snuff, or on chewing tobacco, or on tobacco in some form sold for use as a weed killer -- all these things being made of tobacco -- questions, sometimes of great difficulty, may arise. It is however very important to observe that each of these questions will be a question of fact to be decided on the evidence adduced. The vital element in such a case is the probability of deception. This may depend on a number of matters as well as the question of similarity of the marks or of the get-up."

He has further contended that in the present case the plaintiffs have produced no evidence in the form of affidavits of consumers and/or public establishing that there is a trading of the goodwill of the plaintiffs in Ajanta tooth brush by the defendants by selling Ajanta Tooth Paste. It has also been pointed out that the plaintiffs have produced no evidence that there is any confusion in the market. He has contended that on the other hand the defendants have produced plenty of affidavits of the consumers and dealers establishing that in fact tooth paste of the defendants under brand name 'Ajanta' is well known in the market as belonging to the defendants. He has submitted that even the

sales of tooth paste from 2002 till 2005 were Rs. 3.26 crores. Whereas during the said period the sale figures of plaintiffs Ajanta Tooth brush and other toilet products were only Rs. 1.46 crores which indicate that the defendants have acquired their own good will and have not traded on the goodwill belonging to the plaintiffs. He has thus submitted that the plaintiffs having not produced sufficient material and evidence as necessary, in light of the judgment of the Privy Council the plaintiffs are not entitled to any interim injunction.

52. The learned counsel appearing for the plaintiffs has drawn my attention to the case of Corn Products vs. Shangrila Foods (supra) and has drawn my attention to the principle laid down by the Apex Court that if once there is a trade relation and trade connection is established between the two products then the similar mark cannot be permitted to be traded as there is all likelihood of confusion or deception arising therefrom. It has been submitted that there is no such law to prove even at the interim stage actual deception and/or actual confusion in the market. It has been further contended by the learned counsel for the plaintiffs that the likelihood of confusion or deception arising from the two products and/or while use of similar mark is sufficient to warrant an interim

order from this Court. He has submitted that in the present case tooth paste and tooth brush are used by the same class of consumers and available in the same shop so that the trade channel and the consumer are identical and the use of the tooth brush and tooth paste is so connected that one cannot use tooth paste without tooth brush and tooth brush without tooth paste. He has further submitted that likelihood of confusion in similar kind of product or cognate product is sufficient enough to warrant an injunction from this Court. The learned counsel for the plaintiffs has contended that the judgments in the case of Kamal Trading Co. vs. Gillette UK Ltd. (supra) and Bajaj Electricals Ltd., vs. Metals & Allied Products Ltd., (supra) did not pertain to the same goods but still the Court granted interim orders on the ground that they are the same class of products. The learned counsel for the plaintiffs has further submitted that it is not permissible for this Court to disregard the binding proposition of law as laid down by the Division Bench judgment in the aforesaid two judgments. The learned counsel for the plaintiffs has submitted that the contention of the defendants that the same are merely off the cuff remarks and are irrelevant and unnecessary can not be accepted.

53. The learned counsel for the plaintiffs has thereafter contended that it is not open for the

defendants to rely upon the sales figures which are available subsequent to the date of filing of the suit merely because the ad-interim orders which were initially granted in favour of the plaintiffs were subsequently kept under suspension and the Supreme Court has directed the hearing of the motion. It has been submitted by the learned counsel for the plaintiffs that what is required to be seen is the figures of the sales as on the date of the filing of the suit and application for ad-interim relief and not subsequent figures. In his submission no person can be permitted to state that though during the pendency of the suit he has traded on the reputation of the plaintiff and has acquired large proportion of sale and therefore the injunction should be refused. It is submitted that what is required to be seen is when the plaintiffs approached this Hon'ble Court whether the defendants had already used the mark so extensively so as to disentitle the plaintiff from grant of interim relief. He has submitted that admittedly the plaintiffs having approached the Court in February 2003 and that the defendants entered in the market only in December, 2002 there cannot be any question of any such user which can give the defendants an entitlement of defence of concurrent user of the mark as that of the plaintiffs. In the light of the aforesaid, the learned counsel for the plaintiffs has contended that this Court should grant an interim order of

injunction restraining the defendants from passing off the goods belonging to the defendants as if the same are of the plaintiffs' by using the trade mark 'Ajanta' in relation to tooth pastes which are manufactured by them.

54. I have considered in detail arguments advanced by both senior counsels supported by the large number of authorities cited before me. The first contention of the learned counsel for the plaintiffs is that the plaintiffs are entitled to an injunction in respect of the brand name 'Ajanta' in relation to the sale of goods of tooth paste by virtue of their prior user. I am of the opinion that for the purpose of obtaining such an injunction the plaintiffs must not merely show that they have entered in the market on a prior point of time than the defendants but it is also necessary for them to show that by virtue of such prior user they have acquired a sufficient and considerable reputation in respect of the said mark 'Ajanta' in relation to their product tooth paste. No doubt, on the facts which are placed before me the plaintiffs have entered into the market with their product under the brand name 'Ajanta' in June, 2002 whereas the defendants have entered in the market only in December, 2002. Thus, the plaintiffs are a prior user of the said brand 'Ajanta' being Tooth paste. However, the question is whether the plaintiffs have

acquired reputation in respect of their product by virtue of their prior entry in the market before the defendants entered into the market. In so far as the said aspect is concerned, it is not disputed that the sales figures of the plaintiffs during the period of aforesaid six months is meagre 980 tubes for Rs. 10,078/-. Such meagre or small sale for a period of six months cannot establish any reputation in the market in respect of the brand name 'Ajanta' in relation to the tooth paste products. There is no dispute also in so far as the advertisement expenses are concerned that they are totally insignificant. Admittedly, the plaintiffs have been able to show a small amount of advertisement expenses i.e. two advertisements during the said period of six months. In fact during the period January to July 2003 there is also no sale of any nature whatsoever in respect of the said tooth paste product of the defendants under the brand name 'Ajanta'. Looking at the aforesaid picture which is not substantially disputed by the plaintiffs, I am of the opinion that the plaintiffs cannot qualify themselves for a relief of passing off action on the basis of a prior user. In my opinion, by virtue of the aforesaid prior user the plaintiffs have almost acquired no reputation in the brand name 'Ajanta'. On the contrary, the further evidence produced by the learned counsel for the defendants indicates that the sale though effected to the dealers never

reached market nor there is any substantial sale indicating that the goods of the plaintiffs in the tooth paste are available in the market under the brand name 'Ajanta'. I am also of the further opinion that the learned counsel for the defendants is right in contending that in light of the judgment of the Apex court in the case of Uniplay Industries (supra) which is followed by me in the case of Mecclodes Pharmaceutical Limited (supra) a sporadic sale or a small amount of sale in the market would not entitle any party to claim an injunction of passing off unless the sale must be so, so as to show that the brand name under which the said sales are effected have acquired reputation in the market and has become known in the market with the said brand name.

55. In light of the aforesaid proposition which has been laid down by the Apex Court coupled with my aforesaid judgement, I am of the opinion that a meagre sale of Rs.10,000/- for a period July to December 2002 which is claimed as prior user cannot be treated as such a sale which would indicate that the plaintiffs have acquired any reputation whatsoever in the mark Ajanta in so far as tooth pastes are concerned. In that light of the fact, I am not inclined to accept the claim of the plaintiffs for passing off action on the basis of prior use of trade mark 'Ajanta' in respect of tooth

paste. I am also of the opinion that the plaintiffs have failed to establish any acquisition of reputation by virtue of the prior user of the mark Ajanta in relation to tooth paste and, therefore, they are not entitled to any injunction on the aforesaid ground.

56. The contention of the defendants that in fact the said prior user was introduced by the plaintiffs with a view to preventing the defendants from entering the market and with a view of extort a huge amount of Rs. 3 crores from the defendant is though not required to be considered in light of the view I have taken aforesaid I am of the opinion that the said contention raised is totally devoid of any merit and based on no evidence. I am of the further opinion that such a contention advanced by the learned counsel for the defendants cannot be accepted in absence of any evidence whatsoever and merely on the ground that a meeting took place between the parties for settling the dispute which was pending in Ahmedabad High Court. It is not possible to accept the contention that in the said meeting such a demand was made by the plaintiffs representative.

57. Now coming to the alternate contention which has been argued by the learned counsel for the plaintiffs that if it is held by this Court that the

plaintiffs have acquired no reputation in their brand 'Ajanta' in respect of their goods tooth paste still once the reputation is established in respect of allied product being tooth brush and the same having not been disputed by the defendants, the plaintiffs are entitled to injunction on the principle that the defendants cannot sale a cognate or allied product under the same brand name as that of the plaintiffs and thus the defendants should be injuncted in a passing off action. Before turning to the various authorities cited before me, I am of the view that it is necessary that the principles in respect of cognate goods and allied products as laid down by the well known writer Kerly in Kerley's Law of Trade Marks and Trade Names 12th Edition must be restated. The learned Author has dealt with the case of the same description or associated goods in Vol. 10-12. The learned author has stated as under :-

"The test whether or not goods or services are "of the same description" would seem to be supplied by the question -- Are the two sets so commonly dealt in by the same trader that his customers, knowing his mark in connection with one set and seeing it used in relation to the other, would be likely to suppose that it was so used also to indicate that they were his? The matter should be

looked at from a business and commercial point of view. As Viscount Dunedin said in the "Nuvol." "The material consideration arising in connection with the registration of trade marks are practical." To the cases on this subject, the oft-quoted proposition that each was decided on its own facts is peculiarly applicable and the observations below should be read with this in mind.

It would seem clear that, before goods or services can be of the same description, there must be a description that covers both, although this is not a sufficient test for a description may be too wide to be usable.

In "Panda" Romer J. classified the various matters to be taken into account in deciding whether goods are goods of the same description into three classes--

- (a) the nature and composition of the goods;
- (b) the respective uses of the articles;
- (c) the trade channels through which the commodities respectively are bought and sold.

In respect of the similar field of activity also, the learned author in para 17-08 has stated as under :-

"Whilst the requirement of a common field of activity between plaintiff and defendant was stated in relation to passing-off actions where the plaintiff is not in trade, essentially the same question often arises in actions between traders; whether the plaintiff's and defendant's trades are so connected in the public mind that approximation by the defendant to the plaintiff's trade marks or trade names will both cause confusion and cause damage to the plaintiff's goodwill. This is essentially a matter depending upon the view taken by the court of the special facts of particular cases; though instances of recent decisions may be helpful and are given below. Thus one judge doubted whether a manufacturer could ever monopolise a mark outside his own line of business, and it may be said generally that establishing passing-off by goods in which the plaintiff does not trade calls for special evidence to establish that the defendant's actions will induce the belief, if not that his goods are those of the plaintiff at least that his business is

an extension of or somehow connected with that of the plaintiff, or his goods somehow approved or authorised by the plaintiff. Where the fields of activity of the parties are different, the burden of proving that the defendant causes real likelihood of damage to the plaintiff is a very heavy one. There is some authority for saying that goodwill may extend to natural future extensions of a business, so that a plaintiff may be entitled to prevent use of his name or marks on goods he expects to sell in the future, but the Court of Appeal in "Stringfellow's" doubted that loss of a possible field for "merchandising" of the mark concerned was a permissible head of damage in passing-off."

The law has further developed and the principle of common field of activity and the allied product has been expanded. In the Kerly's Law of Trade Marks and Trade Names, 14th Edition 2005, the learned Author has stated as under :-

"There is no rule that the defendant must operate in the same field of activity as the claimant. However, this does not mean an examination of their respective fields of

activity is irrelevant. The more remote the activities of the parties, the stronger the evidence needed to establish misrepresentation and the real likelihood of damage that are prerequisites of a right of action in passing off. Although this is a question of fact to be determined in the circumstances of the particular case, instances of decisions may be helpful and are given below."

58. In the present case we are not concerned with the super brand status or universal status of any brand because it is not even the case of the plaintiffs that their brand has acquired any such super status so as to entitle the plaintiffs to protect their transborder and transproduct reputation. The case of the plaintiffs is that the goods relating to the same field and/or in any event a cognate and allied products aforesaid are so similar products that it is likely to result in confusion in the minds of public. In my opinion, the principle of cognate and allied product is very much in existence and has been well recognised both by the learned author Kerly in the aforesaid paras as well as various judgments which are cited before me by the plaintiffs. In the case of Corn Products Refining Co. (supra), the Apex court was dealing with the brand name 'Glucovita' glucose vita in

respect of glucose powder mixed with vitamin and other product being glucose biscuits. The Apex Court as far back as in 1960 held that even though the goods are different but by virtue of fact that glucose powder is used in manufacture of biscuits and, therefore, the person is entitled to injunction though the goods are not identical. In para 19 of the said judgment, the Apex Court has considered the aforesaid position. The said para 19 reads as under:-

"(19) It was then said that the goods were not of the same description and that therefore in spite of the similarity of the two marks there would be no risk of confusion or deception. We are unable to accept this contention. It is true that we have to proceed on the basis that the goods are not of the same description for the purposes of S. 10(1) of the Act. But there is evidence that glucose is used in the manufacture of biscuits. That would establish a trade connection between the two commodities, namely, glucose manufactured by the appellant and the biscuits produced by the respondent. An average purchaser would therefore be likely to think that the respondents 'Gluvita biscuits' were made with the appellant's 'Glucovita' glucose.

This was the kind of trade connection between different goods which in the "Black Magic" case (In re: an Application by Edward Hack) 1940-58 RPC 91 was taken into consideration in arriving at the conclusion that there was likelihood of confusion or deception. The goods in this case were chocolates and laxatives and it was proved that laxatives were often made with chocolate coatings. We may also refer to the "Panda" case (In re: an application by Ladislav Jellinek) 1946-63 RPC 59. The goods there concerned were shoes and shoe polishes. It was observed that shoe polishes being used for shoes, there was trade connection between them and that this might lead to confusion or deception though the goods were different. The application for registration was however refused under that section of the English Act which corresponds to S. 8 of our Act on the ground that the opponents, the manufacturers of shoes, had not established a reputation for their trademark among the public."

Thereafter two Division Bench judgments of this Court in the case of Bajaj Electricals Ltd., vs. Metals & Allied Products, Bombay and another, (supra) as well as Kamal Trading (supra) this Court

has once again held that though the goods may not be identical, but if they are allied product or cognate product or fall under the common field of activity then in that event the party is entitled to the injunction merely on the ground of likelihood of confusion in the market. The Delhi High Court has also taken the similar view in the case of Prakash Industries Ltd,. vs. Rajan Enterprises reported in 1994 PTC page 31. In para 32 it was observed as follows :-

"The plaintiff whose goods have acquired a reputation in the market through a trade mark or name with which, the goods have become associated has a right to restrain the defendant from using the trade mark or name which is identical with or similar to that of the plaintiff and such right extends not only to the particular goods sold by the plaintiff but also to cognate classes of goods provided the cumulative effect of the similarity of the mark, the commercial connection between the plaintiff's goods and surrounding circumstances is such as to lead the unwary customers to mistake the defendant's goods for those of the plaintiff."

In the case of Thomas Bear & Sons (India) Ltd., vs.

Prayag Narain and another reported in AIR 1940 Privy Council 86, the Privy Council has held as under :

"Nor are they of opinion that the appellants right is confined only to the sale of the same kind of cigarettes and of Virginia Bird's Eye tobacco; for, in the absence of strong evidence to the contrary, such a mark would ordinarily extend to protect goods so similar in kind to the goods actually put upon the market by the trader in connection with the trade mark that it is an almost inevitable inference that such goods would be manufactured or marketed by the trader. In other words, the probability of deception in the case of goods of a closely similar kind to those actually marketed by the plaintiff would be proved in the course of establishing the trade mark".

In so far as the question of totally distinct goods and biscuits are concerned, it appears that there is a much expansion of law so as to hold that there is no requirement of common field of activity in a passing off action. The judgments which have been relied upon by the learned counsel for the plaintiffs being Kirloskar Diesel Recon Pvt. Ltd., and another v. Kirloskar Proprietary Ltd, and others, (supra) and Aktiebolaget Volvo vs. Volvo

Steels Ltd., (supra) supports the aforesaid contention. In my opinion, it is no doubt true that for the purposes of passing off action in respect of totally dissimilar business or in respect of goods which are poles apart only if it can establish that plaintiffs have acquired such a reputation in a particular name or a brand that the user by the other person even in respect of distinct product would amount to passing off his business and his good will as that of the other person. So as to be entitled to such reliefs the reputation of the brand should have acquired a Global status or super brand status and the business of the plaintiffs must be trans border or trans products. However, that does not mean that in relation of cognate or allied product the plaintiff is not entitled to interim injunction as contended by the learned counsel for the defendants. It is equally not a correct proposition of law advanced by the learned counsel for the defendants that in respect of the allied product or cognate product or supplementary product the plaintiffs must actually prove confusion and/or produce evidence that in market there is an actual confusion and merely likelihood of confusion is not sufficient. In my opinion, the aforesaid judgments which are cited by the learned counsel for the plaintiffs indicate that even if there is a likelihood of a confusion by virtue of the fact that the goods are so closely similar and/or are allied

products or supplementary that there is a likelihood of confusion in the mind of the public that a person is using the similar brand name merely to pass off his goods as that of the plaintiffs is itself sufficient for the purpose of grant of interim order and injunction in a passing off action. Even in my judgment in the case of Indiacom Limited vs. Tata Teleservices Ltd., & Ors. dated 28.10.2005 (Notice of Motion No. 1837 of 2003 in Suit No. 1908 of 2003) I have held that in light of series of judgments of this Court a proposition of law is now well settled that the plaintiff is entitled to an injunction on the basis of cognate product and/or allied product and/or complementary products if the goods are so closely similar to that of the goods of the plaintiffs so as to lead to a likelihood of confusion in market that the goods sold by the defendants in fact belong to the plaintiffs. The learned counsel for the plaintiffs has relied upon two judgments of the Apex Court though arising out of Sales Tax Act in which it is inter alia held that the word "toiletry" includes both tooth paste and tooth brush. In my opinion, tooth paste and tooth brush are undoubtedly complementary products and/or allied product the use of each other is together and in my opinion dependent on each other. In such a situation it is easily likely to create confusion in the minds of the public that the goods belonging to one party in fact belongs to the other party. I am

inclined to accept the contention of the learned counsel for the plaintiffs that they are selling tooth brushes in the market since 1950 would obviously make the people believe that 'Ajanta' tooth paste which has been introduced by the defendants is the product belonging to the plaintiffs and thus there is a likelihood of confusion in the market. I am, therefore, of the opinion that the contention of the learned counsel for the defendants that the said goods even if they are complementary or cognate should not by itself be sufficient enough to grant interim injunction in respect of passing off action on the ground that the plaintiffs have not established actual confusion in the market in respect of the said product is liable to be rejected. I am also of the view that the judgment of the Apex Court in the case of Corn Products (supra) supports the aforesaid view I have taken that the goods being cognate or allied products by virtue of trade connection or trade relation would be sufficient enough to create a confusion in the mind of the people in the market and, therefore, it is necessary that the injunction should be granted to the plaintiffs in so far as the said product of the defendants being tooth paste is concerned under the brand name 'Ajanta'. In my opinion, once the law is well settled that in respect of the allied product or cognate product the injunction can be granted and further in my opinion

that tooth paste and tooth brush being allied and/or cognate products, it is not necessary to make any further enquiry in the matter and the necessary interim order ought to be granted to the plaintiffs herein. However, the learned counsel for the defendants has contended that there is a distinct get up of the box and has tried to bring a distinction in the packet of two products which are sold in the market under the same brand 'Ajanta' and has, therefore, contended that the 'get up' being different, there is no likelihood of any confusion and therefore this Court should not grant any interim injunction. I have also compared both the said packets and its get ups. Firstly, 'word mark' is identical. Secondly phonetically also both the marks are the same. The colour scheme of both the packets is almost identical. Merely because on the defendants tooth paste there is an emblem 'Dento Fresh' and on the tooth brush packet of the plaintiffs there is a photograph of mother and son would not be sufficient enough to create a distinctiveness between the two products so as to hold that there is no likelihood of any confusion in the market. In my opinion, there is no much distinction between 'get up' of the plaintiffs packets and that of the defendants' packet look is substantially identical, the word characters are also identical and, therefore, in my opinion the plaintiffs are entitled to injunction of 'passing

off' on the ground that the defendants are seeking to pass off their goods as that belonging to the plaintiffs.

59. I am also of the view that the defendants had sufficient notice of the plaintiffs using the said mark 'Ajanta' in respect of the tooth brush before they entered into the market with 'Ajanta' brand tooth paste. The defendants have in spite of the same chosen to adopt the said mark and, therefore, I am of the opinion that the adoption of the mark by the defendants of the word 'Ajanta' in relation to its product of tooth paste is not a bonafide adoption and on that ground also I am of the view that the plaintiffs are entitled to injunction on the ground of "passing off".

60. This leads me to the last contention which has been advanced by the learned counsel for the defendants that is that the defendants already have a huge sale of tooth paste under the brand name 'Ajanta' by virtue of the fact that there was no ad-interim order granted in the present case. I am of the opinion that the present motion is required to be considered as on the date of the institution thereof i.e. in 2003 and merely because by virtue of not granting injunction if the defendants have acquired a substantial sale in the market in respect of tooth paste under the said brand then such sale

would not and cannot be taken into consideration for the purpose of determining the grant of injunction at this stage.

61. The next contention which has been advanced by the defendants is that in equity the plaintiffs are not entitled to interim orders. The said contention is raised on the basis that the defendants have established the factory in which employees are working and huge amount of money is invested for the purpose of manufacturing the said product whereas the plaintiffs are selling the product by getting it manufactured by third parties. In my opinion, these are not relevant considerations for the purpose of determination whether the plaintiffs are entitled to injunction of passing off or not. Whether the person is a trader or manufacturer both are equally entitled to protect their brand name and brand in the market because of the reputation and good will earned by the said brand under which the business of the plaintiffs has been carried out. It cannot be said that if the person is not manufacturing himself and thus has not made any investments in the factory would not be entitled to any injunction order for passing off action as sought to be contended by the learned counsel for the defendants. I am therefore of the opinion that this contention of the learned counsel for the defendants on the ground of equity has no

substance and the same is thus required to be rejected.

62. I am of the opinion that the plaintiffs have made out a prima facie case for grant of interim injunction in terms of prayer clause (b) on the basis that the plaintiffs goods are cognate and/or complementary and/or supplementary and/or allied to that of the defendants' goods and thus the defendants are not entitled to sell their product under the brand name 'Ajanta' in the market. The plaintiffs have also acquired a substantial reputation in brand name 'Ajanta' in so far as their product tooth brushes are concerned and therefore their rights are required to be protected. In the light of the aforesaid, I grant the interim order in terms of prayer clause (b) of the motion. Motion is disposed off accordingly. However, there shall be no order as to costs.

63. The learned counsel for the defendants seeks stay of the present order in view of the fact that ad-interim order granted in favour of the plaintiffs was stayed till the hearing of the motion. I grant stay of the present order for the period of four weeks from today.